NO. 48708-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SEAN LANCASTER,

Respondent-Cross Appellant,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Appellant-Cross Respondent.

DEPARTMENT OF CORRECTIONS'S REPLY BRIEF AND RESPONSE TO LANCASTER'S CROSS APPEAL

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I. INTRODUCTION

In 2014, the Department denied Respondent/Cross Appellant Sean Lancaster's public records request for inmate phone records based on its legal position at the time that such records were not public records. The trial court correctly concluded that the Department's policy "appears to have been based on a good faith understanding of the law, including awareness of all three elements in the definition of public records." Lancaster does not assign error to that finding, and the Court should treat such a finding as a verity on appeal. This finding is adequately supported by the record and as Division I of this Court recently found, such a response does not constitute bad faith.

In response to the Department's argument, Lancaster makes a laundry list of arguments about why he believes that the Department acted in bad faith. However, the majority of those arguments do not address the issue that the trial court focused on, i.e. whether the Department reasonably determined that the records of inmate phone calls were not related to the conduct of government. Again, the trial court correctly determined that the Department's position was objectively reasonable. And because Lancaster was denied records as a result of the Department's position and not based on any failure to search for records, the Department did not act in bad faith in denying Lancaster records. The trial court erred

in awarding penalties in the absence of bad faith that actually resulted in the denial of records.

In addition to arguing penalties were properly awarded, Lancaster appeals the trial court's decision to not award penalties for the "follow up/refresher" request that Lancaster purports to have submitted two weeks before he submitted his supplemental briefing to the trial court. Yet, Lancaster does not assign error to the trial court's determination that Lancaster had waived such an argument based on his prior contrary statements in previous pleadings. The trial court's conclusion that Lancaster had suddenly reversed his own position that he had been provided all of the responsive records on the eve of the court hearing was correct.

Finally, Lancaster argues that the trial court should have awarded him greater penalties than it did. Because the trial court's award of penalties was erroneous, the Court should simply reverse and hold that Lancaster is not entitled to penalties. Even if this Court does not reverse the award of penalties, Lancaster has failed to show that the trial court abused its discretion in awarding penalties of $25 per day. This Court should reverse the award of penalties to Lancaster and remand for the trial court to evaluate an award of costs in light of the finding of no bad faith.

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II. COUNTER STATEMENT OF THE ISSUES RELATED TO CROSS-APPEAL

1. Did the trial court appropriately determine that Lancaster had waived any argument that he had not been provided all responsive records based on his own representations that he had been provided all responsive records?

2. The trial court erred by awarding penalties to Lancaster at all. However, even if this Court concludes that penalties were appropriately awarded, did the trial court appropriately exercise its broad discretion in imposing a $25 daily penalty?

III. COUNTER STATEMENT OF THE CASE[1]

In November 2014, the Department received a public records request from Lancaster in which he sought any and all records of inmate phone calls at SCCC involving his pin number. CP 107, 110. His request stated that he specifically was seeking each outgoing number called or attempted; the date and time of each call; and from which telephone the call was made. CP 107, 110. The Department initially denied Lancaster's request based on its position that such records were not public records. CP 107, 112. Upon receipt of this lawsuit, the Department gathered

[1] The Department's Opening Brief included a Statement of the Case related to the issues it raised on appeal. This Counterstatement of the Case contains only the facts relevant and necessary to the issues raised by Lancaster's Cross Appeal. The Department's Opening Brief provided a full factual background related to its arguments and does not repeat those facts here.

Lancaster's requested phone logs and provided them to him. CP 108. A month after he filed the lawsuit, Lancaster filed a motion for partial summary judgment. CP 13-20. In response, the Department conceded that the phone records were public records and filed a cross motion for show cause. CP 72-131. Lancaster asked for a continuance of the hearing on the show cause motion and argued that the Department could not be prejudiced by a continuance because they had produced the responsive records. CP 135.

The hearing on the Department's show cause motion was continued multiple times by the trial court. The trial court then held a scheduling conference on June 17, 2015, and it entered a scheduling order based on input from the parties. In this scheduling order, the trial court noted that "The parties agreed that all responsive records have since been made available to Plaintiff." CP 151. The court then set a hearing on the Department's motion to show cause and permitted the parties to submit supplemental briefing. CP 151.

Following the scheduling conference, the parties entered into a stipulation. This stipulation was designed to allow Lancaster to avoid being deposed in this case. CP 54. In exchange for not being deposed, Lancaster agreed to not "file any additional declarations of himself in this case, except as necessary to present discovery answers." CP 154.

Lancaster also agreed that the Court would dismiss the case with prejudice if he failed to abide by the stipulation. CP 154-55.

Consistent with the parties' scheduling order, Lancaster submitted a supplemental brief in July 2015. In his supplemental brief, Lancaster argued for the first time that he had not been provided all responsive records and he cited a letter that he had sent to the Public Disclosure Specialist and the Department's counsel two weeks prior to the supplemental briefing. CP 163. The Department argued that Lancaster's claim that there was an ongoing violation had been waived. CP 214.

On January 12, 2016, the trial court issued a letter opinion on the motion to show cause. CP 237-247. The trial court concluded that it would not consider Lancaster's belated argument that he was not provided all of the responsive records because those issues were beyond the scope of the Scheduling Order and were inconsistent with prior statements made by Lancaster. CP 237. Based on the arguments that the trial court did address, the trial court concluded the Department's position was objectively reasonable and not in bad faith. CP 241-245. However, the trial court found that the Department acted in bad faith because the Department failed to search to see if the specific phone logs had ever been accessed for agency business and failed to inform the requester that inmate phone logs

could be public records if they had been accessed for use in agency business. CP 245-47. Lancaster filed a timely notice of cross-appeal.

IV. STANDARD OF REVIEW

The Court reviews challenges to agency actions under the PRA de novo. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 217 P.3d 1172 (2009); *Mechling v. City of Monroe*, 152 Wn. App. 830, 222 P.3d 808 (2009). Appellate courts stand in the same position as the trial courts when the record on a show cause motion consists only of affidavits, memoranda of law, and other documentary evidence. *Mitchell v. Washington State Dep't of Corr.*, 164 Wn. App. 597, 602, 277 P.3d 670 (2011), *as amended on reconsideration in part.*

V. ARGUMENT

The trial court erred in finding that Lancaster was denied records as a result of the Department's bad faith. As the trial court concluded in this case and Division I of the Court of Appeals concluded in the consolidated *Cook* appeal, the Department's position was objectively reasonable. *Cook v. Wash. State Dep't of Corr.*, 197 Wn. App. 1061, 2017 WL 478321 (2017) (unpublished), *petition for review denied* 188 Wn.2d 1016 (2017). The denial of records was a result of the Department's reliance on its objectively reasonable policy as the court in *Cook* held. Lancaster has not challenged this factual finding. Nor has

Lancaster addressed the causation requirement in RCW 42.56.565 or the Department's evidence that his phone records were not used by the Department. This Court can reverse on this causation argument alone.

The trial court appropriately precluded Lancaster from raising a claim of an ongoing violation contrary to his concessions that all responsive records had been provided. Lancaster does not assign error to the trial court's determination that these claims were beyond the scheduling order and inconsistent with his prior statements, and the trial court's determination was correct.

Because the trial court erred in finding bad faith despite the absence of causation, the court's award of penalties to Lancaster should be reversed. But if any penalties are warranted, the trial court appropriately exercised its discretion is awarding Lancaster $25 daily penalties.

A. The Court Should Not Consider Any Evidence Submitted by Lancaster in Violation of the Parties' Stipulation Because Such Evidence is Not Properly Part of the Record on Appeal

Civil Rule 2A allows parties or their attorneys to enter into stipulations. Wash. Civ. R. 2A. Courts encourage parties to settle their differences through the use of stipulations at any stage of the proceeding. *Nguyen v. Sacred Heart Medical Center*, 97 Wn. App. 728, 735, 987 P.2d 634 (1999). A stipulation is a contract and is construed according to the

legal principles that govern contracts. *Allstot v. Edwards*, 114 Wn. App. 625, 636, 60 P.3d 601 (2002).

Lancaster entered into a stipulation about what type of evidence he would submit in declarations in exchange for avoiding being deposed. The Court should not consider any evidence submitted in violation of the stipulation. In response to Lancaster's motion for protective order seeking relief from sitting for a deposition, the parties entered into a stipulation relieving him of the obligation in exchange for an agreement that he "withdraws all declarations by him that he previously filed in this case, agrees to not rely on such declarations, and agrees not to file any additional declarations of himself in this case except as necessary to present discovery answers as evidence." CP 154-155. By its terms, the remedy for violations of this stipulation is dismissal with prejudice. *Id*. Although the Department does not argue at this stage that such dismissal was required by the trial court, this Court should at the least refuse to consider evidence submitted in violation of the stipulation.[2] On appeal Lancaster now attempts to rely on these declarations and the attached evidence to invent new claims and request additional penalties. *See* Brief. Lancaster is both judicially estopped from doing so and legally precluded

[2] If the Court does remand the case to address the merits of penalties or any new violations, the Department reserves the right to raise this issue in the trial court.

from relying on evidence which he stipulated would be stricken from the record.

First, Lancaster is judicially estopped from making arguments based on this excluded evidence because this is inconsistent with his previous representation to withdraw this evidence. The three key inquiries in determining the applicability of judicial estoppel are: "(1) whether a party's later position is clearly inconsistent with its earlier position; (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that the court was misled; (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." A*rkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 539, 160 P.3d 13 (2007) (internal quotations omitted).

Here, Lancaster not only represented to the Department and the court that he had withdrawn the previously-submitted substantive declarations and would not rely on this evidence, but he stipulated to such and agreed that violation of this stipulation would result in dismissal of this action. CP 154-155. Therefore, this initial representation and later reliance on the evidence is clearly inconsistent. What's more, this representation misled the court and the Department in an effort to avoid

the Department deposing Lancaster, and therefore he would derive an unfair advantage and the Department is at an unfair disadvantage.

Beyond the equitable principle of estoppel, Lancaster entered into a legal stipulation and should be held to this agreement. A stipulation signed and subscribed by parties is a contract and its construction is governed by the legal principles applicable to contracts. *Allstot*, 114 Wn. App. at 636. Lancaster entered into a contract to withdraw his previously submitted declarations and not rely on them except for to authenticate discovery responses in exchange for the Department agreeing to forego deposing him. CP 154-155. Lancaster's subsequent submission of substantive declarations and reliance on his declaration is a breach of this contract and should not be sanctioned by this court.

Therefore, this Court should limit its review to the proper record on review and disregard all declarations and attachments by Lancaster except to the extent that they merely authenticate discovery responses.

B. The Trial Court Erred in Finding Bad Faith and Awarding Penalties Despite Its Conclusion That the Department Denied Lancaster's Request Based on an Objectively Reasonable Position

An agency does not act in bad faith when it denies records based on a legal position that is not farfetched or asserted with knowledge of its invalidity. *See King Cnty. v. Sheehan*, 114 Wn. App. 325, 356-57, 57 P.3d

307 (2002) (noting "although we do not find the County's arguments against disclosure to be persuasive, they are not so farfetched as to constitute bad faith."); *see also Adams v. Washington State Dep't of Corr*, 189 Wn. App. 925, 951, 361 P.3d 749 (2015).

The trial court found that the Department's legal position in this case was "based on a good faith understanding of the law, including awareness of all three elements in the definition of public records.' CP 244-45. Lancaster does not assign error to that finding. And in light of that conclusion and the evidence that the Department denied Lancaster the requested records based on its position regarding inmate phone logs, the trial court erred in proceeding to award penalties.

1. Lancaster's Failure to Assign Error to the Trial Court's Finding That the Department's Position Was Based on a Good Faith Understanding of the Law Makes That Finding a Verity on Appeal

When an appellant does not assign error to a trial court's factual findings, those findings are verities on appeal. *Francis v. Washington State Dep't of Corr.*, 178 Wn. App. 42, 52, 313 P.3d 457 (2013); *see also State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). This rule applies equally to findings related to the issue of bad faith under RCW 42.56.565(1). *See Adams*, 189 Wn. App. 925, 939-40, 361 P.3d 749 (2015)

(treating unchallenged findings that the agency acted unreasonably and that its position was indefensible as verities on appeal).

Here, Lancaster makes various assignments of error but he does not assign error to the trial court's finding, nor does he identify a challenge to this finding in his statement of issues. As such, any argument that this finding was erroneous has been waived, and this Court should consider such a finding as a verity on appeal.

2. The Department's Reasonable Position That Inmate Phone Records Were Not Public Records Did Not Result in the Denial of Any Records in Bad Faith

The Department's initial denial of records in response to Lancaster's request was based on its determination that such records did not meet the definition of a public record. As discussed above, the trial court determined that this position was reasonable and in good faith. Similarly, Division I of the Court of Appeals recently decided a case involving the same policy related to the inmate phone logs. Like the trial court here, the *Cook* court correctly determined that the Department's position that phone logs were not public records unless they were accessed or used by the Department was objectively reasonable. CP 237-247. Such a determination is consistent with prior case law, *see Francis*, 178 Wn. App. at 63; *Sheehan*, 114 Wn. App. at 356-57 (noting "although we do not find the County's arguments against disclosure to be persuasive, they are

not so farfetched as to constitute bad faith."); *Adams*, 189 Wn. App. at 951, and is supported by the factual record. That factual record indicates that the Department made the decision that such records that were maintained by a third party contractor were not public records based on discussion among Department staff and a consideration of the nature of the records. CP 98. The Department also considered that the phone logs were records of communications between offenders and their loved ones and that the logs served no governmental function unless accessed by the Department. CP 98. In light of the nature of these records, the Department reasonably concluded that such records were not related to the conduct of government and therefore were not public records.

In response to the Department's arguments against bad faith, Lancaster argues that an agency cannot create a policy of nondisclosure, that the Department knew that phone logs were public records, and that the Department failed to conduct any serious independent analysis of inmate phone logs. As an initial matter, Lancaster is precluded from attacking the trial court's finding that the Department's position was in good faith because he did not assign error to this finding. Regardless, Lancaster's arguments are unavailing.

Lancaster argues that an agency cannot adopt a policy that provides an independent basis for nondisclosure. Lancaster's Brief, at 15-

16. However, this argument misses the point. The Department adopted a legal position regarding inmate phone logs and that position was that such records were not public records. The Newsbrief in this case that addressed inmate phone logs simply explained the Department's legal position and approach in processing requests for a particular type of record. And the mere fact that an agency's position is incorrect does not mean that the agency acted in bad faith. S*ee Francis*, 178 Wn. App. at 63; *Sheehan,* 114 Wn. App. at 356-57. Here, as the trial court and Division I of this Court also concluded, the Department's legal position was not farfetched and was adopted in good faith.

Lancaster also argues that the Department knew that these records were owned and used. However, this argument is based on multiple mischaracterization of the relevant record. For example, Lancaster asserts that the Department knew since 2006 "that it 'shall own and control 'and 'shall own and hold all rights' to all information about inmate phone activity that is recorded and maintained by GTL." Lancaster's Brief, at 12.[3] In making this argument, Lancaster creatively edits the relevant portions of the contract. The contract actually states that the Department

[3] Lancaster's brief is riddled with similar unsupported assertions and affirmative mischaracterizations of the record. Another example of such statement is Lancaster's assertion that "It is undisputed that DOC knew since April 2006 that it owns, controls, and uses all information recorded by GTL." Lancaster's Brief, at 3. No portion of the record is cited in support of this assertion, and it is unsupported.

owns "the data contained on the Recording Media," CP 30, and that GTL "owns all equipment including the recording media." CP 30. As the Department argued, the issue of ownership based on this language is complex. CP 244 (noting this argument in its ruling). Furthermore, as the trial court explicitly pointed out, even for records that are owned by a state agency, the record still must be related to the conduct of government to be public records. CP 244. And because a record must meet all three elements of the statutory definition to be a public record, inmate phone logs would not be public records if they were not related to the conduct of government. In Lancaster's various arguments about ownership and use, he ignores and makes no clear argument that inmate phone logs are related to the conduct of government. As the trial court concluded, the Department reasonably determined that phone logs were not related to the conduct of government, and its position was not farfetched as a result.

Next, Lancaster asserts that the Department failed to conduct independent analysis of whether inmate phone logs were public records. Contrary to Lancaster's unsupported conclusion that the Department failed to engage in a serious or independent analysis, the record shows that the Department was thoughtful in considering and implementing Newsbrief 13-01. *See* CP 90-126. As part of these deliberations, the Department considered the security concerns associated with releasing the records, the

statutory definition of a public record, and the key cases analyzing the definition of a public record. CP 90-114; 187-189 In this way, this case is in stark contrast to *Adams*. Nor did the Department ignore judicial rulings as Lancaster argues. Instead, upon receiving a prior ruling on this issue, the Department vetted the issue internally and considered legislation and ultimately changed its practice. CP 90-114; 187-189. The Department also provided Lancaster the requested records upon notice of this lawsuit consistent with its change in practice. CP 108.

Finally, Lancaster's attempts to distinguish this case from *Cook* are similarly unavailing. First, the fact that Lancaster cross-appealed this case on issues specific to his case (ie: an ongoing violation, and request for higher penalties) that were not present in *Cook* is of no consequence. Neither of these issues have bearing on the core issue for which the Department relies upon *Cook*: that the Court erred in finding that the Department acted in bad faith because it found that the Department's position was objectively reasonable and any bad faith did not actually cause the denial of records.

Nor is this case distinguishable from *Cook* on the basis that the Department supposedly admitted that it owned or used the records for collecting commissions in this case and not in *Cook*. Rather, the Department made no specific admission related to the ownership or use of

records requested in this case, CP 73, and to the extent that anything in this case could be construed as such, the same thing is true for *Cook*. Instead, the record here reflects that the Department's contract with the third-party vendor contains a clause that states that "DOC shall own and hold all rights with respect to the data contained on the Recording Media" but there was no admission in this case nor in *Cook* that this language controls the records requested here. *See* CP 176-177. Beyond this, Lancaster has not assigned error to the trial court's finding that the Department's position was objectively reasonable nor does this address the absence of causation between the alleged bad faith and the denial of records.

Lancaster's failure to assign error to the trial Court's finding that the Department's formulation of Newsbrief 13-01 waives his opportunity to challenge the reasonableness of the Department's legal position. But even if this court were to reach the merits of the Department's position, it should rule consistent with the trial court and Division I in *Cook* that the Department's position that phone logs revealing communications between private citizens that were not used or accessed by the Department are not public records reasonable. This Court should reverse the finding of bad faith.

C. Lancaster Fails to Meaningfully Address the Causation Requirement in RCW 42.56.565

The Department's Opening Brief argued that a court must find that the alleged bad faith resulted in the denial of records in order to award penalties under RCW 42.56.565(1). Opening Brief, at 18-29. In this case, the trial court ran afoul of that requirement because it did not find that the Department's reason for denying the records was farfetched or otherwise in bad faith. Indeed, it ruled that the Department's position that the phone logs were not public records was objectively reasonable and *not* in bad faith. CP 244-245. Instead, it found—and premised the award of penalties on—the Department's failure to conduct a search that would not have resulted in a different response and its failure to provide additional information about its position was in bad faith. But because the denial of records was caused by the objectively reasonable position of the agency and not by the failure to search or inform the requester of the intricacies of the Newsbrief, the denial of records was not the result of any bad faith.

Lancaster fails to provide any evidence or argument that the Department's reliance on Newsbrief 13-01 actually caused the denial of any records to him. Beyond this, any evidence or argument would be unsupported by the record given that Lancaster stipulated to the withdrawal of his declarations. *See* CP 154-155. Instead, Lancaster's

response to the Department's argument misses the mark by arguing that the Public Records Act requires an adequate search and ignores that it is unrefuted that no records would have been provided even if the Department had conducted a search. *See* CP 259-275.

Lancaster also argues that the Public Records Act requires an agency to search for records. But this argument again misses the mark. A failure to search may constitute a PRA violation, but the failure to search does not amount to a denial of records in bad faith when the failure to search did not cause the denial of records. In fact, Lancaster himself appears to recognize that the denial in this case was caused by the adoption of the Newsbrief and not by the failure to search. Lancaster's Opening Brief, at 27-28. In light of this fact, the trial court erred in awarding penalties despite evidence that the alleged bad faith conduct resulted in the denial of records.

As explained in the Department's opening brief, RCW 42.56.565(1) requires any bad faith to have caused the denial of records. Both the legislative history and the structure and terms of art used in this provision requires so. Beyond this, an interpretation to the contrary to the policies underlying RCW 42.56.565(1) by allowing inmates to obtain penalties in circumstances not available to other requesters. *See, e.g.*, *Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 809, 246 P.3d 768

(2011) ("penalties are authorized only for denials of 'the right to inspect or copy'"); *City of Lakewood v. Koenig*, 182 Wn.2d 87, 343 P.3d 335 (2014) (same; declining to award penalties for an insufficient brief explanation); *Neighborhood Alliance of Spokane Cnty. v. Cnty. of Spokane*, 172 Wn.2d 702, 261 P.3d 119 (2011) (declining to award daily penalties for a freestanding violation for an inadequate search); *see also Hikel v. City of Lynnwood*, 197 Wn. App. 366, 379, 389 P.3d 677 (2016) (concluding there are no penalties for procedural violations). Again, Lancaster fails to adequately address the argument.

Because the trial court awarded penalties based on aspects of the Department's response that did not cause the trial of penalties, it erred in premising the award of penalties on such conduct. Therefore, this Court should reverse the bad faith finding on this independent basis.

D. The Trial Court Properly Concluded That Lancaster's Argument Regarding Ongoing Violations Are Precluded by His Multiple Concessions That He Had Received All Responsive Records

At least twice Lancaster unambiguously conceded that the Department had subsequently provided all records responsive to his public records request. The trial court, therefore correctly declined to address Lancaster's ongoing violation argument finding that this argument is

"contrary to the statements made in prior pleadings" and limited its review to the issues framed by the parties in the scheduling order. CP 238.

Lancaster violated the trial court's scheduling order by belatedly raising additional violations beyond those identified in the court's scheduling order. The purpose of scheduling and pretrial orders is to permit orderly discovery and pretrial preparation. *See Estate of Fahnlander*, 81 Wn. App. 206, 211, 913 P.2d 426 (1996). Pretrial orders control "the subsequent course of the action unless modified at trial to prevent manifest injustice." *Stempel v. Dep't of Water Res.*, 82 Wn.2d 109, 115, 508 P.2d 166, 170 (1973). This is even more robust in Thurston County, where, the local rules require that the parties identify the issues in dispute at a Public Records Act status hearing at the outset of the case. Thurston County Super. Ct. Local Court Rules (LCR) 16(c)(1)(E).

Like in *Stemple*, the scheduling order at issue here identified the issues in dispute. *See Stempel*, 82 Wn.2d at 109. Specifically, the scheduling order noted that "the parties agreed that the issue in dispute is whether the Defendant acted in bad faith under RCW 42.56.565(1) in failing to provide the phone logs to Plaintiff until March 2015." CP 151-152. The order continued "[t]he parties agree that the briefing and any future discovery will be limited to the issues in dispute identified above." *Id*. Lancaster never moved to amend the scheduling order, and it was not

until the eve of the merits determination that Lancaster changed course and asserted that additional responsive records existed. CP 163. But similar to *Stemple*, because this claim was not one of the listed issues, this claim "is improper as it is beyond the scope of the pretrial order." *See Stempel*, 82 Wn.2d at 109. The Court did not error in precluding Lancaster from belatedly raising an ongoing violation claim because it was not included in the scheduling order.

Beyond this, Lancaster's multiple admissions that he had received all responsive records operated as a waiver for any additional violations. "A 'waiver' is the intentional and voluntary relinquishment of a known right." *Birkeland v. Corbett*, 51 Wn.2d 554, 565, 320 P.2d 635 (1958). "The person against whom a waiver is claimed must have intended to relinquish the right, advantage, or benefit, and his actions must be inconsistent with any other intention than to waive them." *Id.* And an issue that is expressly conceded or abandoned by a party at the trial level will not be addressed on appeal. *See Hollenback v. Shriners Hospitals for Children*, 149 Wn. App. 810, 206 P.3d 337 (2009).

In light of Lancaster's multiple representations to the Department and the court that the Department had provided him all responsive records, the trial court appropriately exercised its discretion in declining to reach this argument. This is so because Lancaster waived any claim to the

entitlement to further records in response to the request at issue in this case. Specifically, Lancaster agreed in the agreed scheduling order that "all responsive records have since been made available to Plaintiff." CP 151-152. This scheduling order also states that the parties agreed that the only issue in dispute was "whether the Defendant acted in bad faith… in failing to produce the responsive phone logs…." *Id.* Even more, Lancaster's reply on Summary Judgment conceded that the Department had produced all responsive records and that any penalty clock had been stopped. CP 135 ("as it decided to produce the withheld records shortly after it received Plaintiff's motion for partial summary judgment, thereby limiting the period of potential penalty days.") In light of these express concessions, the trial court appropriately found that Lancaster's belated claim was "contrary to the statements made in prior pleadings" and declined reach this issue.

Beyond this, Lancaster's claim regarding an ongoing violation is not supported by any evidence in the record. Instead, as a result of the stipulation he entered into to avoid being deposed, he agreed to strike and not rely upon his declarations except for those necessary to authenticate the Department's discovery responses. CP 154-155; *See Infra* Section A. This alone is a sufficient basis to affirm the trial court declining to address

Lancaster's belated and unsupported claim of an ongoing Public Records Act violation.[4]

At least twice Lancaster unambiguously conceded that the Department had subsequently provided all records responsive to his public records request. The trial court, therefore correctly declined to address Lancaster's ongoing violation argument finding that this argument is "contrary to the statements made in prior pleadings." CP 238.

E. No Penalty Is Appropriate Under RCW 42.56.565; However if Any Penalty is Warranted, the Trial Court Did Not Abuse Its Discretion in Setting a Penalty Amount

RCW 42.56.550(4) gives courts discretion "to award [a requestor] an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record." The award of penalties is reviewed for abuse of discretion. *Yousoufian v. Office of Ron Sims* (*Yousoufian II*), 152 Wn.2d 421, 430-31, 98 P.3d 463 (2004). "A court abuses its discretion only when it adopts a view that no reasonable person would take or when it bases its decision on untenable grounds or reasons." *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 277, 372 P.3d 97 (2016) (Internal citations and quotations

[4] In the event this Court reverses on this ground, the proper remedy is remand for the trial court to determine whether there are additional responsive records, and if so, whether any denial was in bad faith under RCW 42.56.565(1), and if so, the appropriate amount of penalties.

omitted). Lancaster argues that the trial court should have awarded penalties of more than $25 per day. He is wrong for a number of reasons.

First, Lancaster is wrong because he was not entitled to any penalties at all. For the reasons discussed above, the trial court erred in concluding that the Department denied Lancaster records in bad faith. As a result, Lancaster was not entitled to any penalties.

Even if this Court determines that some penalties are appropriate, Lancaster has not and cannot show that the trial court's $25 daily penalty was an abuse of discretion. Instead, the trial court's 11 page letter opinion reflects that the court considered a range of factors in determining the appropriate penalty amount. CP 237-247. For example, the court considered factors, such as the unreasonableness of the Department's failure to follow its policy, the incomplete information the Department provided the requester, and its failure to search for potentially responsive records. *Id.* While the Department disagrees that such aggravating factors apply in this case, the court's consideration of these factors supports its exercise of discretion in awarding penalties. *See* CP 246-47. And the court's consideration of them in determining an appropriate penalty amount was an appropriate exercise of discretion and consistent with the factors that the Supreme Court has recognized as relevant to a penalty determination. *Adams*, 189 Wn. App. at. 955 (holding that a trial court's

consideration of a factor on bad faith can also be relevant to a penalty determination.); *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 466–68, 229 P.3d 735 (2010) (*Yousoufian* V).

Lancaster does not address any of the specific *Yousoufian* factors or the factors that the trial court considering in making its penalty determination. Instead, Lancaster argues that an inmate requester is always entitled to a penalty at the high-end of the scale, which Lancaster defines as $75 to $100 per day, because inmates must show bad faith to be awarded penalties. Lancaster's Brief, at 48. However, Lancaster's argument is foreclosed by both case law from the Supreme Court and this Court.

Contrary to Lancaster's argument, a finding of bad faith does not require a penalty on the higher end. Rather, the courts have routinely underscored a trial court's considerable discretion in setting penalties. *Wade's*, 185 Wn.2d 270 (noting that even the *Yousoufian* factors should not infringe upon the considerable discretion of trial courts to determine Public Records Act penalties.). And the Supreme Court in *Yousoufian* rejected an approach to Public Records Act penalties adopted by Division I of this Court that involved the court starting with a certain tier based on the level of culpability. *Yousoufian*, 168 Wn.2d at 463. Furthermore, based on this considerable discretion, the Court of Appeals has routinely

affirmed the award of penalties to inmates that are not at the high end of the penalty range as defined by Lancaster. *See Francis*, 178 Wn.App at 50 (affirming the award of a $10 daily penalty despite the requester's argument that he should have been not have been awarded a penalty at the lower end of the scale); *Adams*, 189 Wn. App. at 951 (upholding the trial court's bad faith finding and approving of the $35 daily penalty). Therefore, the Court should reject Lancaster's invitation to adopt a presumption in a case involving an inmate to start at the top of the penalty amount.

Finally, to the extent that Lancaster premises a claimed penalty error upon the alleged "follow up" request, this claim is meritless. There is no evidence in the record to support this claim, and Lancaster is precluded from arguing such. *See Infra* Section A. And even if Lancaster were now allowed to resurrect this belated claim, this Court should not address the merits of such a claim or a penalty determination in the first instance. Instead the proper remedy would be to remand for a determination by the trial court.

Because the trial court should not have awarded penalties, the court's decision to award penalties should be reversed. But if this Court determines that Lancaster was entitled to penalties, the trial court did not abuse its discretion in awarding $25 daily penalties.

VI. CONCLUSION

This Court should reverse the trial court's finding of bad faith because the trial court erred in finding bad faith and imposing penalties upon the Department. Additionally, this Court should affirm the trial court's decision to decline to address Lancaster's belated claim that he had not been provided all responsive records. Based on these determinations, this Court should reverse and remand for the trial court to enter a finding that the Department did not act in bad faith and for the trial court to evaluate the award of costs in light of the finding of no bad faith.

RESPECTFULLY SUBMITTED this 7th day of February, 2018.

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CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the DEPARTMENT OF CORRECTIONS'S REPLY BRIEF AND RESPONSE TO LANCASTER'S CROSS APPEAL with the Clerk of the Court using the electronic filing system and I hereby certify that I have mailed by United States Postal Service the document to the following non electronic filing participant:

SEAN LANCASTER, DOC #993150
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 7th day of February, 2018 at Olympia, Washington.

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February 07, 2018 - 1:49 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	48708-0
Appellate Court Case Title:	Sean Lancaster, Respondent/Cross-Appellant v. DOC, Appellant/Cross-Respondent
Superior Court Case Number:	15-2-00223-3

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